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DOES A GREEN BUILDING NEED A GREEN LEASE?

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I. INTRODUCTION

A Green lease is not the same old lease for a nonresidential building simply printed on recycled paper, but rather it is a new form of lease for buildings that are more resource-efficient and environmentally responsible, have lower operating costs and increased asset values, and enhance occupant comfort and health.

A Green lease allocates the risks and premiums associated with Green building when there are different incentives from the usual ones that arise from a typical triple net lease where, by way of example, the owner pays for the capital improvements to reduce energy use, but the tenant who pays the utility bills reaps a Green building's benefit of energy savings.

Of course, a Green lease is, first and foremost, a lease: a contract for the conveyance of real property for a term, in exchange for consideration of rent, that gives rise to a relationship of landlord and tenant.[1] A Green lease is often, but not always, for a tenant space in a Green building.[2]

Given that a lease is the most common real estate transaction involved in Green building (as opposed to the much smaller number of one-time contracts between an owner and an architect for a Green building design), analysis of a Green lease is an efficacious vehicle

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1. *See* BLACK'S LAW DICTIONARY 907 (8th ed. 2004).

2. Tenants are increasingly building-out their leased premises with Green improvements even where the core and shell of the building are not employing Green strategies. The LEED for Commercial Interiors standard expressly provides for such a situation by permitting commercial interior premises to be LEED certified, even when the building shell is not LEED certified. *See* U.S. GREEN BLDG. COUNCIL, LEED FOR COMMERCIAL INTERIORS (2nd ed. 2005), *available at* http://www.usgbc.org/showfile.aspx?DocumentID=684; *infra* notes 98–101 and accompanying text.

for considering Green building issues. This Article will begin by explaining the rudiments of resource efficiency, and will build upon that foundation with a discussion on the "Greening"[3] of buildings, assessed through a focused analysis of Green lease issues.

II. ENERGY COSTS AND ENVIRONMENTAL IMPACTS OF EXISTING BUILDINGS

Buildings have a surprisingly large impact on the natural environment. In 2002, buildings contributed 38.1% of total carbon dioxide emissions in the United States.[4] Residential buildings contributed 20.6% of all carbon dioxide emitted in the United States that year, while commercial buildings contributed 17.5% of carbon dioxide emitted that year.[5] In contrast, cars and light trucks together produce only 20.5% of carbon dioxide pollution.[6]

Buildings are also tremendous consumers of electricity, accounting for 72.0% of the total electricity consumption in the United States.[7] Buildings in the United States also account for 37.0% of the nation's energy use.[8] Of that total, 51.2% is attributed to residential building use, while 48.8% is attributed to commercial building usage.[9]

In 2000, building occupants used 38.34 billion gallons of water per day, which was 9.4% of the total water consumed in the United States per day.[10] Homeowners accounted for 6.9% of total water use, while commercial building occupants accounted for 2.5% of the total.[11] Water quality is impacted when buildings, along with the

3. In today's environmental lexicon, the adjective "green" has quickly transmogrified into a verb as well.

4. GREEN BLDG. WORKGROUP, U.S. ENVTL. PROT. AGENCY, BUILDINGS AND THE ENVIRONMENT: A STATISTICAL SUMMARY (2004), http://www.epa.gov/greenbuilding/pubs/gbstats.pdf [hereinafter BUILDINGS AND THE ENVIRONMENT].

5. *Id.*

6. ENERGY INFO. ADMIN., U.S. DEP'T OF ENERGY, EMISSIONS OF GREENHOUSE GASES IN THE UNITED STATES 2002, at 23 (2003), *available at* http://tonto.eia.doe.gov/ftproot/environment/057302.pdf.

7. USGBC: Green Building Research, http://www.usgbc.org/DisplayPage.aspx?cmspageID=1718 (last visited Jan. 29, 2009).

8. MCGRAW-HILL CONSTR., GLOBAL GREEN BUILDING TRENDS 7 (2008).

9. *Id.*

10. D & R INT'L, LTD., U.S. DEPT. OF ENERGY, 2008 BUILDINGS ENERGY DATA BOOK, § 8-2, tbl.8.1 (2008), *available at* http://buildingsdatabook.eren.doe.gov/docs%5CDataBooks%5C2008_BEDB_Updated.pdf.

11. *Id.*

transportation infrastructure that serves them, replace natural surfaces with impervious materials.[12]

While anecdotally we know that businesses may choose Green building for reasons such as the benefits of marketing as Green, human resource advantages in recruitment and worker productivity, and corporate citizenship, the field of Green building is driven by uncertain and increasing energy costs and the environmental impacts of existing buildings.[13] An overwhelming 89% of corporate leaders surveyed in 2008 reported that reducing energy consumption was the top driver for Green buildings.[14] In another 2008 study, 47% of company executives said that cost savings were the leading driver for investment in energy efficiency, while only 16% were driven by environmental stewardship.[15]

III. THE DOLLARS AND CENTS CASE FOR GREEN BUILDING

Beyond concerns about global competition for energy and concerns about the environmental impacts of buildings and climate change, a dollars and cents case exists that now justifies the construction of Green buildings.

According to a 2008 CoStar Group study,[16] Leadership in Energy and Environmental Design (LEED®)[17] buildings command rental rate premiums of $11.33 per square foot over non-LEED buildings, and

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12. *See generally* WAITAKERE CITY COUNCIL, DISTRICT PLAN GUIDELINES: NATURAL AREAS 1 (2003), *available at* http://www.waitakere.govt.nz/abtcnl/pp/districtplan/pdf/infosheets/na/impermsrfc.pdf.
13. *See* MCGRAW-HILL CONSTR., *supra* note 8 at 3, 20–21.
14. *Id.* at 3.
15. JOHNSON CONTROLS, JOHNSON CONTROLS ENERGY EFFICIENCY INDICATOR RESEARCH 20 (2008), *available at* http://johnsoncontrols.mediaroom.com/file.php/1311/Report_North_America.pdf. In March 2008, Johnson Controls surveyed 1150 North American executives for its second Johnson Controls Energy Efficiency Indicator Survey. *Id.* at 1. Nearly 40% of those surveyed believe it is extremely or very likely that, within the next two years, legislation will mandate energy efficiency or carbon reduction, and 31% believe that "green buildings will be extremely or very important in attracting and retaining future employees." *Id.* at 21–22 (emphasis removed). Johnson Controls describes its survey as "the most authoritative study of energy management practices." Press Release, Johnson Controls, New Research Reveals Increased Interest in Energy Efficiency, but Limited Action (Apr. 14, 2008), *available at* http://johnsoncontrols.mediaroom.com/index.php?s=113&item=1445&printable.
16. *See* Andrew C. Burr, *CoStar Study Finds Energy Star, LEED Bldgs. Outperform Peers*, COSTAR GROUP, Mar. 26, 2008, http://www.costar.com/News/Article.aspx?id=D968F1E0DCF73712B03A099E0E99C679.
17. LEED is a Green building rating system. *See infra* Part VII.C.

LEED buildings have 4.1% higher occupancy than non-LEED buildings.[18] Rental rates in Energy Star® buildings[19] possess an approximately $2.40 per square foot premium over similar non-Energy Star buildings, and Energy Star buildings have about 3.6% higher occupancy than non-Energy Star buildings.[20] Energy Star buildings use 40.0% less energy than average buildings,[21] while Gold and Platinum LEED-certified buildings use about 50.0% less energy than average buildings.[22]

Merchant developers may begin to pay greater attention to Green buildings, as "Energy Star buildings are selling for an average of $61 per square foot more than their peers, while LEED buildings command a remarkable $171 more per square foot" (i.e., $438 per square foot for LEED-rated buildings, versus $267 per square foot for non-LEED buildings).[23]

The Energy Independence and Security Act of 2007 mandates that, starting in 2010, the federal government may lease only Green buildings with, at a minimum, Energy Star designation.[24] Ever increasing numbers of state and local governments are also enacting mandates that require future government leases to be in Green

18. Burr, *supra* note 16. CoStar generated its results by analyzing more than 1300 LEED-certified and Energy Star-certified buildings, representing about 351 million square feet of the roughly 44 billion square feet in CoStar's commercial property database, and assessed those buildings against non-Green properties with similar "size, location, class, tenancy and year-built characteristics." *See* Greener Buildings, *CoStar Study Finds Higher Demand, Rent Prices for Green Buildings*, Mar. 31, 2008, http://www.greenerbuildings.com/print/22872.

19. Energy Star is a joint program of the U.S. Environmental Protection Agency and the U.S. Department of Energy, designed to deliver cost-efficient energy and to "protect the environment through energy efficient products and practices." *See* About Energy Star: Energy Star, http://www.energystar.gov/index.cfm?c=about.ab_index (last visited Jan. 29, 2009); *infra* Part VI.

20. Burr, *supra* note 16.

21. *Id.*

22. Press Release, U.S. Green Bldg. Council, Newly Released Studies Confirm Energy Savings Significant in LEED, ENERGY STAR Bldgs. (Apr. 3, 2008), *available at* http://www.usgbc.org/Docs/news/nBIandCoStarGroupRelease040108.pdf. For a discussion on operating costs and how reduced energy costs increase the value of Green buildings, see *infra* text accompanying notes 150–53.

23. Burr, *supra* note 16. There is anecdotal support for these large dollar dividends, including a 10% higher market value for assets, 5-10% higher rents, and 14% higher relative investment returns. *See* GREEN BLDG. COUNCIL AUSTL., THE DOLLARS AND SENSE OF GREEN BUILDINGS 2006, at 5 (2006), *available at* http://www.aela.org.au/publications/Dollars_and_Sense.pdf.

24. *See infra* note 36 and accompanying text.

buildings.[25] With Green buildings in short supply, a premium will exist for those owners contemplating leasing to governments.

These high premiums, which have been coined the "Sustainability Dividend,"[26] easily justify the 2% or less impact on total project budgets attributed to Green costs (which are largely soft costs for areas such as planning, designing, making application for third-party Green certification, and performing enhanced building commissioning).[27] Well-positioned and proactive owners of commercial real estate can reap the rewards (i.e., the Sustainability Dividend) of Green building well above the asset class as a whole.

Moreover, non-Green buildings risk becoming obsolete, "[a]s the market shift gathers even greater momentum in coming years, [and] standard buildings will become the real-estate industry's version of the buggy whip."[28] Recall the rapid obsolescence of commercial buildings without central air conditioning in the early 1960s, and the resultant massive decline in values as tenants sought out buildings

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25. *See infra* Part V.C.

26. The term Sustainability Dividend, as applied to Green building, has replaced and expanded upon the earlier concept of Green Premiums. *See* Natural Resources Defense Council, Building Green Fact Sheets, http://www.nrdc.org/buildinggreen/factsheets/cost.asp (last visited Jan. 29, 2009) [hereinafter Building Green Fact Sheets]. The Sustainability Dividend is the enhanced financial performance of real estate that arises from applying principles of environmental science. Owners who take a strategic approach to sustainability create value in their real property, such as increased rental rates and reduced operating costs. For a discussion on sustainability, see generally JOHNSON CONTROLS, INTRODUCTION TO SUSTAINABILITY (2008), *available at* http://www.johnsoncontrols.com/publish/etc/medialib/jci/be/commercial/energy_efficiency/documents.Par.50535.File.dat/Sustainability_WorkBook.pdf.

27. *See* Building Green Fact Sheets, *supra* note 26. While beyond the scope of this Article, the nonhomogenous nature of buildings makes it impossible to accurately comment on the construction costs of building Green. If anything, the widely used 2% increase in total project budget is high, as Green building has evolved from the work of early adopters into a major market segment. *See* Charles Lockwood, *As Green as the Gas Outside*, BARRON'S, Dec. 25, 2006, at 37. As the field of Green building has advanced, many experienced builders report that budgets are not increased at all, but are simply different. A comprehensive 2006 study found "no significant difference in average costs for green buildings as compared to non-green building." DAVIS LANGDON, COST OF GREEN REVISITED 3 (2007), *available at* http://www.davislangdon.com/upload/images/publications/USA/The%20Cost%20of%20Green%20Revisited.pdf. Additionally, a study regarding the cost of building Green in New York City, to be completed in mid-2009 by the New York chapter of the U.S. Green Building Council, found no statistical dollar cost difference between Green construction and non-Green construction. Green Building Cost Study, http://usgbcny.org/initiatives/cost-study.html (last visited Jan. 29, 2009).

28. Lockwood, *supra* note 27.

with that innovation.[29] In most major property markets today, a building must be Green in order to be Class A; that market shift portends the Greening, by renovation and the like, of existing buildings.

IV. WHAT MAKES A BUILDING GREEN?

There is no single accepted definition of Green building. Nor are there widely accepted standards for measuring, verifying, or evaluating Green building practices.[30] The government does not define Green; however, the U.S. Environmental Protection Agency notes that:

> Green building is the practice of creating structures and using processes that are environmentally responsible and resource-efficient throughout a building's life-cycle from siting to design, construction, operation, maintenance, renovation[,] and deconstruction. This practice expands and complements the classical building design concerns of economy, utility, durability[,] and comfort. Green building is also known as a sustainable or high performance building.[31]

Sustainability, while a broader concept than Green building, is defined by the United Nation's World Commission on Environment and Development as "meet[ing] the needs of the present without compromising the ability of future generations to meet their own needs."[32]

At the federal level, the Energy Policy Act of 2005[33] and the Energy Independence and Security Act of 2007[34] included energy efficiency and sustainable design requirements for federal buildings. Additionally, since the early 1990s, there have been a series of executive orders and agency-specific rules promoting Green building,

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29. *See id.*
30. *See* MARA BAUM, U.S. GREEN BLDG. COUNCIL, GREEN BUILDING RESEARCH FUNDING: AN ASSESSMENT OF CURRENT ACTIVITY IN THE UNITED STATES 9 (2007), *available at* http://www.usgbc.org/showfile.aspx?DocumentID=2465 (noting that the concept of Green building cannot be defined with precision).
31. U.S. Environmental Protection Agency Green Building Basic Information, www.epa.gov/greenbuilding/pubs/about.htm (last visited Jan. 29, 2009).
32. THE WORLD COMM'N ON ENV'T AND DEV., OUR COMMON FUTURE 43 (1987).
33. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified as amended in scattered sections of 42 U.S.C.).
34. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (codified as amended in scattered sections of 42 U.S.C.).

and the federal government has instituted sustainable practices at many of its buildings.[35] While none of that rises to the level of providing a uniform definition of Green building, the federal government, starting in 2010 and with few exceptions, can only lease buildings that achieve certain Energy Star designations.[36]

The state of Maryland is representative of state governments, in that it does not have a single definition for Green building. Interestingly, as early as 2001, section 10-722 in the Tax-General Article of the Annotated Code of Maryland provided that "[b]y regulation, the [Maryland Energy] Administration shall adopt standards for a building to qualify as a green base building eligible for the tax credits under this section that are consistent with the criteria for green base buildings set forth by the United States Green Building Council or other similar criteria." Although Maryland was one of the first states to offer the voluntary incentive of a Green building tax credit against a taxpayer's personal or corporate income tax,[37] the definition created for that program is not replicated in future Maryland enactments.

Hundreds of local governments across the nation enacted some form of Green building legislation during 2008,[38] but as would be expected from such a plethora of unrelated enactments, they provide no single definition of Green building. The definitions range from exacting to extremely broad. For example, Baltimore City approved a relatively simple and fairly typical definitional standard; although as applied, it is also among the strictest mandatory Green building laws in the country. Section 3705.1.2 of the Baltimore City Revised Code provides simply:

> For a City building included in the capital budget for Fiscal Year 2010 or later . . . the building must achieve . . . a silver-level rating in the appropriate LEED rating system, as certified by the [U.S.] Green Building Council, or . . .

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35. *See* BLDG. GREEN, INC., U.S. DEP'T OF ENERGY, GREENING FEDERAL FACILITIES 6–8 (2nd ed. 2001), *available at* http://www1.eere.energy.gov/femp/pdfs/29267-0.pdf (summarizing a variety of federal regulations and executive orders that promote Green building).

36. *See* 42 U.S.C.A. § 17091 (West Supp. 2008).

37. MD. CODE ANN., TAX-GEN. § 10-722 (LexisNexis 2004).

38. *See, e.g.*, OFFICE OF THE CAL. ATT'Y GEN., LOCAL GOVERNMENT GREEN BUILDING ORDINANCES IN CALIFORNIA 1–2 (2008), *available at* http://ag.ca.gov/globalwarming/pdf/green_building.pdf (noting that, as of December 18, 2008, twenty-seven cities in California had enacted mandatory Green building ordinances).

> energy and environmental design standards that the Building Official identifies as equivalent to a silver-level rating in the appropriate LEED rating system.

In contrast, Carroll County, Maryland selected a more progressive definition, not tied to LEED or some other third-party rating system, within its property tax credit incentive. Carroll County defines Green building as having "environmentally friendly or 'green' technologies, including conserving water, incorporating recycled or recyclable materials, and incorporating renewable and energy efficient power generation."[39] The law further authorizes Carroll County's governing body to enact a local ordinance implementing the new tax credit.[40]

V. A BROAD BREADTH OF GREEN LAWS

While there is no accepted definition for Green building, governments across the country are enacting Green building laws that seek to articulate energy policy and environmental solutions, including laws that respond to the overwhelming public sentiment that government has not done enough to protect the planet. This new body of law follows three distinct regulatory schemes. The first regulatory scheme is for a government to require that its government-owned buildings be constructed to an articulated Green building standard. A second, and widely admired, regulatory scheme is when a government offers voluntary incentives to private developers, whether as tax breaks, direct grants or loans, or advantages in processing approvals for Green buildings. And third, a modest number of local governments are mandating by law that all new construction or major renovations, which exceed a certain square footage, whether public or private, must be constructed to a Green building standard.

A. Governments Building Green

Government schemes that require their own building to be Green date back more than a decade when, on September 14, 1998, President Clinton issued the first of three Greening executive orders, Executive Order 13,101, calling upon the federal government to increase its "use of recycled products [including recovered products] and environmentally preferable products [including building

39. MD. CODE ANN., TAX-PROP. § 9-308(e)(1) (LexisNexis Supp. 2008).
40. *See id.* § 9-308(e)(2).

products]."[41] By 2003, federal government building accounted for nearly 10% of all LEED-registered projects.[42] While the federal government remains at the forefront of Green building, some states, including Maryland,[43] and some local governments, from San Francisco to New York,[44] have self-imposed requirements for government-owned buildings.

B. Voluntary Incentives

The second regulatory scheme involves voluntary incentives offered by government, as tax breaks, direct grants or loans, or advantages in processing approvals for Green buildings, as a nonprescriptive, nonmandatory approach which does not burden owners and operators of land with another mandate.[45] This philosophy of advantaging Green building is a real estate owner friendly, results-oriented environmental incentive that may portend a future for broader environmental policy, going even beyond Green building.

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41. Exec. Order No. 13,101, 63 Fed. Reg. 49,643 (Sept. 14, 1998). A final rule amending the Federal Acquisition Regulation clarified language concerning the use of products including building materials or recovered materials. *See* Federal Acquisition Regulations for Department of Defense, et al., 73 Fed. Reg. 21,801 (Apr. 22, 2008) (to be codified at 48 C.F.R. pt. 1). Then-President-elect Barack Obama announced in his December 6, 2008, weekly radio address, which detailed his proposed Economic Recovery Plan, that "[f]irst, we will launch a massive effort to make public buildings more energy-efficient . . . by replacing old heating systems and installing efficient light bulbs." *Remarks of President-elect Barack Obama, Radio Address on the Economy* (radio broadcast Dec. 6, 2008), *available at* http://change.gov/newsroom/entry/the_key_parts_of_the_jobs_plan/. The then-President-elect went on to promise "the most sweeping effort to modernize and upgrade school buildings[,] . . . mak[ing] them energy-efficient." *Id.* Much of what he proposed can be accomplished by executive order. *See id.*

42. BLDG. DESIGN & CONSTR., BUILDING DESIGN AND CONSTRUCTION: WHITE PAPER ON SUSTAINABILITY 20 (2003), *available at* http://www.usgbc.org/Docs/Resources/BDCWhitePaperR2.pdf.

43. *See* MD. CODE ANN., STATE FIN. & PROC. § 3-602.1 (LexisNexis Supp. 2008) (imposing, with some exceptions, a LEED Silver rating or an equivalent rating on buildings constructed in capital projects funded solely with state funds).

44. *See* S. F., CAL, ENVIRONMENT CODE ch. 7, § 707 (2008); N.Y., N.Y., CITY CHARTER ch. 9, § 224.1 (2007).

45. The U.S. Green Building Council reports, as of January 1, 2009, that forty-four states and one hundred seventy-two localities offer various LEED initiatives, some of which include voluntary incentives tied to LEED standards. *See* USGBC: Government Resources, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1779 (last visited Jan. 29, 2009).

On October 3, 2008, Congress passed, and President Bush signed into law, the Emergency Economic Stabilization Act of 2008, a $700 billion financial rescue package that included $150 billion of tax breaks and voluntary incentives.[46] Significantly, the bill included about $18 billion in alternative energy tax credits,[47] including the extension of the all-important energy-efficient commercial buildings deduction, and the creation of a new tax credit for electricity created by waves, tides, or ocean currents.[48]

By way of background, a host of existing federal Green building and renewable energy tax credits were set to expire at the end of 2008.[49] Extensions of those tax provisions were a component part of several of the attempted energy bills that failed to obtain Congressional approval in 2008.[50] These tax credits were finally extended through the "Energy Improvement and Extension Act of 2008," which provides one of H.R. 1424's most significant provisions to help advance Green building. Section 303 provides a five-year extension, through 2013, of the federal income tax deduction for the cost of certain energy-efficient equipment installed in commercial buildings.[51] This deduction may be as much as $1.80 per square foot of building floor area for buildings that achieve a 50% reduction in energy and power costs.[52]

Maryland programs are typical of other state initiatives. In 2004, Maryland offered a Green building tax credit against a taxpayer's personal or corporate income tax, capped at a maximum of $25 million in tax credits that could be issued by the state.[53] However, all credits have now been allocated in Maryland; many similar tax credit programs are now fully expended and are no longer accepting

46. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

47. Press Release, United States Senate Comm. on Fin., Senate Moves to Protect Working Americans Threatened by Looming Financial Crisis (Oct. 1, 2008), *available at* http://www.finance.senate.gov/press/Bpress/2008press/prb100108a.pdf.

48. Emergency Economic Stabilization Act § 102; Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, § 303, 122. Stat. 3807, 3845.

49. *See* Press Release, Natural Res. Def. Council, Energy Efficiency and Renewable EnergyTax Breaks Pass House Vote (Feb. 27, 2008), *available at* http://www.nrdc.org/media/2008/080227a.asp.

50. *See* Campaign Highlights Summer 2008, http://www.ucsusa.org/ (search "Clean Energy 2008"; then follow "Campaign Highlights Summer 2008" hyperlink) (last visited Jan. 29, 2009).

51. *See* Energy Improvement and Extension Act § 303.

52. Staff Summary of the Energy Improvement and Extension Act, at 5, http://www.finance.senate.gov/sitepages/leg/LEG 2008/091708 (last visited Jan. 29, 2009).

53. MD. CODE ANN., TAX-GEN. § 10-722(b)(1), (k)(1)(v) (LexisNexis 2004).

applications.[54] Despite this, local governments are increasingly offering property tax credits. Typical of those laws, effective December 3, 2007, Baltimore County offered a five-year tax credit, in the amount of the percentage of the total county property tax assessed on a Green building, as follows: 50% for LEED certified Silver buildings, 60% for LEED certified Gold buildings, and 80% for LEED certified Platinum buildings.[55]

C. Government Mandates

Pursuing the third scheme of new laws, Baltimore City is representative of a very limited number of jurisdictions, mandating that, for all new construction and renovation of both private and public buildings over 10,000 square feet, "[e]very . . . building . . . must achieve . . . a silver-level rating in the appropriate LEED rating system, as certified by the Green Building Council."[56] Boston was the first major city to mandate Green building of private development.[57] But unlike Baltimore's law, the Boston mandate applies only to construction of buildings of 50,000 square feet or more, and only requires that each project be LEED "certifiable," though it need not actually be LEED certified.[58] Howard County, Maryland,[59] and Montgomery County, Maryland,[60] are other examples of local governments that currently mandate privately owned buildings to be third-party certified as Green. Monterey, California mandates LEED certification for nonresidential construction, and use of the Build It Green Checklist for residential renovation and new construction after July 1, 2009.[61] On September 4, 2008, San Francisco enacted a mandate whereby, with some exceptions, new commercial buildings of 5,000 gross square feet or more, and renovations in commercial and residential buildings of 25,000 gross square feet or more, must be either LEED certified or

54. *See* Green Building Tax Credit, http://energy.maryland.gov/incentives/business/greenbuilding/index.asp (last visited Jan. 29, 2009).
55. BALT. COUNTY, MD., CODE art. 11, § 11-2-203.1(c) (2008).
56. BALT., MD., BLDG. CODE ch. 37, § 3705 (2008). The mandate for LEED Silver for all buildings is effective July 1, 2009. *Id.*
57. Brooks Rainwater, *Boston, D.C., Adopt Green Building Rules for Private Development*, AIARCHITECT THIS WEEK, Feb. 2, 2007, http://www.aia.org/aiarchitect/thisweek07/0202/0202p_bostondc.cfm.
58. *See* BOSTON, MASS., MUN. CODE art. 37, § 37-4 (2007).
59. HOWARD COUNTY, MD., CODE § 3.1004(b) (2008).
60. MONTGOMERY COUNTY, MD., CODE ch. 8, § 08.26.01.02 (2008).
61. *See* MONTEREY, CAL., CODE ch. 38, art. 3, § 38-11 (2008); art. 17, § 38-112.3.

GreenPoint Rated, depending on the type of building.[62] Other localities have enacted mandatory laws with long lead times for compliance, such as the District of Columbia ordinance that applies to "new construction or substantial improvement of a nonresidential privately-owned project with 50,000 square feet of gross floor area or more," beginning January 1, 2010.[63]

VI. ENERGY STAR

Governments in the United States do not have their own Green building certification programs, nor do they otherwise affirmatively review and approve buildings as Green. The exception to that precept is the federal government's Energy Star program.[64] Commercial and industrial facilities consume about half of all energy used in the United States "at a cost of over $200 billion per year, more than any other sector of the economy."[65] Since the Energy Star rating for commercial buildings was introduced in 1999, thousands of buildings in the United States have earned the Energy Star "and are saving billions in energy costs."[66] In the Energy Star system, a building's energy performance is scored on a 1 to 100 scale, and those facilities that achieve a score of 75 or higher are eligible for the Energy Star label, as this score indicates that a building's energy performance is in the top 25% of facilities in the country.[67]

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62. S.F., CAL., BLDG. CODE ch. 13C, §§ 1303C, 1304C (2008).

63. D.C. CODE § 6-1451.03 (2008). On December 4, 2008, the City of Portland Office of Sustainable Development unveiled a controversial draft proposal for an innovative form of market-driven mandate. For new commercial buildings larger than or equal to 20,000 gross square feet and multifamily buildings larger than or equal to 5000 gross square feet, the proposed law creates a market-based instrument termed a "feebate." The feebate presents developers with three options: (1) pay a one-time fee for conventional construction built to the minimum requirements of Oregon's energy code, (2) receive a waiver for a project built to LEED Silver, or (3) reap a one-time financial reward, funded by the fees paid into the program by conventional construction, for LEED Gold or Platinum building projects. *See* OFFICE OF SUSTAINABLE DEV., CITY OF PORTLAND PROPOSED HIGH PERFORMANCE GREEN BUILDING POLICY 6, 8, 10 tbl.2 (2008), *available at* http://www.portlandonline.com/osd/index.cfm?c=45879&a=220879.

64. *See generally* Energy Star, http://www.energystar.gov (last visited Jan. 29, 2009).

65. The Energy Star for Buildings and Manufacturing Plants, http://www.energystar.gov/index.cfm?c=business.bus_bldgs (last visited Jan. 29, 2009).

66. *Id.*

67. *Id.*

VII. THIRD-PARTY GREEN CERTIFICATION

While a Green building owner is usually not required to obtain a certification that his building is indeed Green, third-party certifications may be required to qualify for benefits such as government tax credits, or may be required if the building is in one of the limited number of jurisdictions that mandate Green certification.[68]

Third-party environmental certification programs have emerged as a guide for Green building, aiding owners and operators by providing a framework, if not literally an actual checklist, for Green building efforts, and by providing a system for documenting sustainable performance and costs.[69] There are several private and nonprofit Green building certification programs in the marketplace, including Green Globes®, BREEAM®, and LEED.[70] Other countries have similar third-party rating systems, presenting a unique set of issues for multinational companies Greening their real estate portfolio.[71] Incident to corporate sustainability initiatives, several of the Forbes 100 companies have created vanity Green building programs, unique

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68. *See supra* Part V. Commentators have criticized an admittedly limited, but ever increasing, number of local governments for the misuse of third-party certifications that are intended to be voluntary, market-based incentives to build Green.

69. *See* STEPHEN OLSON, JENNY CARNEY & MICHAEL ARNY, LEONARDO ACAD. INC., DELIVER THE GREEN 5–6 (2006).

70. *See infra* Part VII.A–C. Although there are other third-party Green certification programs such as the National Association of Home Builders' (NAHB) National Green Building Program, Building America, and Green Committees, none are particularly relevant to nonresidential Green building leasing. For more background on these programs, see About NAHB Green, http://www.nahbgreen.org/About/default.aspx (last visited Jan. 29, 2009) (program that promotes excellence in Green residential design and construction); Building America: About Building America, http://www1.eere.energy.gov/buildings/building_america/about.html (last visited Jan. 29, 2009) (a private/public partnership, sponsored by the U.S. Department of Energy, that conducts research to find energy-efficient solutions for new and existing housing that can be implemented on a production basis); Green Communities, About Green Communities, http://www.greencommunitiesonline.org/about (last visited Jan. 29, 2009) (the first national Green building program developed for affordable housing).

71. *See, e.g.*, Comprehensive Assessment System for Building Environmental Efficiency (CASBEE), www.ibec.or.jp/CASBEE/english/index.htm (last visited Jan. 29, 2009) (an environmental performance assessment tool created in 2001 by the Japan GreenBuild Council/Japan Sustainable Building Consortium); What Is Green Star?, http://www.gbca.org.au/green-star/what-is-green-star/1539.htm (last visited Jan. 29, 2009) (describing a rating scheme of one to six stars, created in 2003 by the Green Building Council of Australia).

to their respective business organizations.[72] Such a program may be particularly appealing to a company doing business in multiple jurisdictions (or, for that matter, multiple countries), or a company with a diverse portfolio of building types.

A. Green Globes

Green Globes, introduced in the United States in 2004,[73] originated from the Great Britain-based BREEAM system.[74] The Canadian environmental consulting firm ECD Energy and Environment Canada Ltd. (ECD) created Green Globes, which is an online building tool that in Canada is now named Go Green ("Visez vert"), and is the basis for the Building Owners and Managers Association (BOMA) of Canada's energy and environmental program.[75] Green Globes in the United States was adapted from this Canadian protocol, and has been administered by the nonprofit Green Building Initiative (GBI). While it operates as a self-administered rating process, GBI added a site-inspection component for those building owners desiring an independently verified rating of one to four Green Globes.[76]

In July 2008, Jones Lang LaSalle Inc. announced the acquisition of ECD, which was the developer of the technology underlying both Green Globes for GBI, and Go Green for BOMA Canada.[77] Under the terms of the acquisition, the Green Globes standards will be kept independent from Jones Lang LaSalle Inc., and GBI will continue to "oversee and administer" Green Globes in the United States.[78] With

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72. *See generally* Dow Jones Sustainability Indexes, http://www.sustainability-index.com/07_htmle/sustainability/corpsustainability.html (last visited Jan. 29, 2009) (providing an overview of corporate sustainability as an investable concept).
73. *See* Green Building Initiative, About GBI, http://www.thegbi.org/about-gbi/ (last visited Jan. 29, 2009).
74. *See* Green Globes, About Green Globes, http://www.greenglobes.com/about.asp (last visited Jan. 29, 2009).
75. *See id.*
76. *See* The GBI: Green Globes Tools, http://www.thegbi.org/green-globes-tools/ (last visited Jan. 29, 2009).
77. Becky Brun, *Jones Lang LaSalle Snags Green Globes Tool*, SUSTAINABLE INDUSTRIES, July 25, 2008, http://www.sustainableindustries.com/greenbuilding/25904609.html.
78. *See* Green Building Initiative, A Message from the President, http://www.thegbi.org/home.asp (last visited Jan. 29, 2009). The GBI is governed by a multi-stakeholder board of fifteen directors featuring representatives from industry, NGOs, construction companies, architectural firms and academic institutions. Ultimately, the GBI aims to expand the board to thirty participants, consisting of ten producers, ten users (builders, architects, engineers, etc.) and ten interested parties.

that said, in the future, a private, for-profit owned Green Globes may not be viewed as a neutral and detached decision maker.

Green Globes can be used with any size building and is weighted differently than LEED's standards, as Green Globes gives greater emphasis toward energy savings (using EPA data on existing building benchmarks, instead of ASHRAE[79] data), a building's lifecycle, and carbon footprints.[80] Small building owners oftentimes find Green Globes an ideal rating system because of its ease in application to small, lower budget buildings, such as individual houses, and because of its modest application costs of $3,000–$5,000 (which may be one-tenth the cost of applying to LEED).[81]

B. BREEAM

Building Research Establishment's Environmental Assessment Method (BREEAM) was not only the first third-party rating system, but is today "the world's most widely used environmental assessment method for buildings."[82] While not widely used in the United States, the Great Britain-based BREEAM, created in 1990[83] (based upon the 1980 work of British engineer and architect John Doggart), has an international scope, and can be used "to assess the environmental performance of any type of building (new and existing)."[84] BREEAM assesses buildings against its own set criteria, and provides a building with an overall score of Pass, Good, Very Good, Excellent, or, only recently, Outstanding.[85]

BREEAM usage can be expected to expand greatly in the United States as a result of the International Council of Shopping Centers (ICSC) April 2008 venture with BREEAM to adapt its sustainability standard for ICSC members working in the European Union. That

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79. The American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE) makes standards for refrigeration processes, and writes on the design and maintenance of indoor environments. *See generally* About ASHRAE, http://www.ashrae.org/aboutus/ (last visited Jan. 29, 2009).
80. *See* The GBI: Green Globes Tools, *supra* note 76.
81. *See* Green Globes, Frequently Asked Questions, http://www.greenglobes.com/about-faq.asp (last visited Jan. 29, 2009).
82. *See* BREEAM, Frequently Asked Questions, http://www.breeam.org/page.jsp?id=27 (last visited Jan. 29, 2009).
83. BREEAM, About BREEAM Buildings, http://www.breeam.org/page.jsp?id=13 (last visited Jan. 29, 2009).
84. *See* BREEAM Buildings, From Starter Homes to Opera Houses, http://www.breeam.org/page_1col.jsp?id=54 (last visited Jan. 29, 2009).
85. BREEAM, Frequently Asked Questions, *supra* note 82.

venture includes a vision of a future international program by ICSC that will include the United States.[86] Moreover, should the United States move to a "carbon cap and trade" program, BREEAM's experience with the European Union's Kyoto-based carbon trading, will no doubt give it a leg up on valuing Green building in the United States.

C. LEED

With over 15,000 members,[87] the U.S. Green Building Council's (USGBC) Leadership In Energy and Environmental Design (LEED) program is by far the most widely accepted not-for-profit Green building certification program in the United States, since its founding in 1993.[88]

LEED is the third-party certification program that is arguably the nationally accepted benchmark for the design, construction, and operation of high performance Green buildings.[89] LEED promotes a whole-building approach to sustainability by recognizing performance in "five key areas of human and environmental health: sustainable site development, water savings, energy efficiency, materials selection and indoor environmental quality."[90]

LEED is a point-based system where buildings earn credits for satisfying specific Green building criteria.[91] The number of points determines the level of certification. Points are available in four progressive levels from Certified for 26 to 32 points, Silver for 33 to 38 points, through Gold for 39 to 51 points, and Platinum for 52 to 69 points.[92]

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86. *See generally* First Pan-European Retail Sustainability Standard Launched (Oct. 7, 2008), http://retailnu.wordpress.com/2008/10/07/first-pan-european-retail-sustainability-standard-launched/.

87. U.S. Green Building Council, About Membership, http://www.usgbc.org/displaypage.aspx?CMsPageID=1716 (last visited Feb. 4, 2009).

88. *See* BRIAN W. BLAESSER, DISCRETIONARY LAND USE CONTROLS: AVOIDING INVITATIONS TO ABUSE OF DISCRETION § 8:74 (Thomson Reuters/West 11th ed. 2008), *available at* WL DISCLU § 8:74.

89. *Id.*

90. *See* U.S. GREEN BUILDING COUNCIL, LEED FOR NEW CONSTRUCTION V2.2 REGISTERED PROJECT CHECKLIST, www.usgbc.org/ShowFile.aspx?DocumentID=3998 (last visited Feb. 4, 2009).

91. *Id.*

92. *Id. See infra* text accompanying notes 112–14 (discussing the refinement and realignment of credits in a new 100-point scale).

1. LEED Rating Systems, by Category

LEED rating systems exist in specific categories.[93] The LEED for New Construction (LEED NC) rating system is the cornerstone of the LEED program and sets standards for high performance commercial and institutional new construction and major renovation projects, including office buildings, high-rise residential buildings, government buildings, recreational facilities, manufacturing plants, and laboratories.[94]

The LEED for Existing Buildings: Operations & Maintenance (LEED EB: O&M) rating system has building owners measure operations, improvements, and maintenance with the goal of maximizing operational efficiency while minimizing environmental impacts.[95] LEED EB: O&M "addresses whole-building cleaning and maintenance issues (including chemical use), recycling programs, exterior maintenance programs, and systems upgrades," but is different from other LEED systems in that it does not necessarily involve new construction.[96] With more than 60 billion square feet of already constructed building stock in this country, Greening those 4.5 million existing commercial buildings can make a significant contribution.[97] And given the large number of existing buildings versus new Green buildings being erected, particularly in this period of economic uncertainty where tight credit is slowing new construction, it is all but certain that most Green leases will be for LEED EB: O&M buildings.

LEED for Commercial Interiors (LEED CI) is the Green bull's–eye for tenants (including all nonresidential uses) and given both the sheer number of tenant spaces and the flexibility that the LEED CI rating affords, it is a huge opportunity for Greening buildings. It is a

93. U.S. Green Building Council, LEED Rating Systems, http://www.usgbc.org/displaypage.aspx?CMsPageID=222 (last visited Feb. 4, 2009).

94. U.S. Green Building Council, LEED for Existing Buildings, http://www.usgbc.org/displaypage.aspx?CMsPageID=221 (last visited Feb. 4, 2009).

95. *Id.*

96. *Id.*

97. As of January 1, 2009, 17,450 buildings have been registered under LEED, although only 2,122 have, to that date, been certified. U.S. GREEN BLDG. COUNCIL, GREEN BUILDING BY THE NUMBERS, at 2 (2009), http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1718 (follow "Green Buildings by the Numbers document" hyperlink) (last visited Feb. 4, 2009). Out of those buildings, 409 have been registered and 39 have been certified in Maryland. *See* U.S Green Building Council, LEED Projects & Case Studies Directory, http://www.usgbc.org/LEED/Project/CertifiedProjectList.aspx (last visited Feb. 2, 2009).

system for certifying high performance tenant spaces that are less costly to operate and maintain; healthy, productive places to work; and have a reduced environmental footprint.[98] LEED CI empowers tenants without control over the whole building to make sustainable choices in their build out and operations.[99] Significantly, a tenant can obtain a LEED CI rating in a non-LEED building.[100] By way of creative example, a tenant that is a branch facility of a Danish company leased a significant space in a flex space building in suburban Baltimore (a building shell type that could not readily obtain LEED certification), required the landlord to build out the space and obtain LEED CI certification, thereby avoiding the Danish CO_2 tax.[101] It can be anticipated that in raw numbers, given the very large number of nonresidential tenants (within existing buildings) across the country, the largest number of applications for LEED certification will be requests for LEED CI rating of tenant spaces.

LEED for Core & Shell (LEED CS) is a Green building rating system for builders, merchant developers, and new building owners who want to construct a building for rent to others, often a building with more than one tenant, which will have a sustainable design and the resultant reduced operating costs and increased asset value for the core and shell.[102] LEED CS covers base building elements such as structure, envelope, and the HVAC system.[103] LEED CS is designed to be complementary to the LEED CI rating system, as both rating systems establish Green building criteria for developers, owners, and

98. U.S. Green Building Council, LEED for Commercial Interiors, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=145 (last visited Feb. 4, 2009).

99. *Id.*

100. *See id.*

101. In a high profile example, Brennan Beer Gorman Architects' new headquarters on the 25th floor of the Empire State Building, is seeking the landmark building's first LEED CI rating. Posting of Stephen Del Percio to Monday LEEDoff (Sept. 15, 2008), http://www.greenbuildingsNYC.com/2008/06/16/ml-bbg-bbgm-to-seek-empire-state-buildings-first-leed-ci-rating/. The 32,000 square feet tenant space, leased for fifteen years, includes two 9500 pound chillers that will run independently from the rest of the building and were designed to save the tenant 15% on energy consumption over ASHRAE standards. *Id.* Seeking a LEED CI Silver rating for the space, other Green design features include low volatile organic compound (VOC) paints and adhesives, recycled-content materials, certified wood floors, Interface carpet tiles, Ecophon fiberglass ceiling tiles and wall coverings, and custom strawboard millwork. *Id.* And this is not the only tenant currently seeking a LEED rating in the Empire State Building. *Id.* On the 32nd floor, construction giant Skanska USA is pursuing a LEED CI Platinum rating for its 24,000 square feet headquarters. *Id.*

102. *See* U.S. Green Building Council, LEED for Core & Shell, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=295 (last visited Feb. 4, 2009).

103. *Id.*

tenants.[104] The LEED CS rating system acknowledges the limitations of landlords in a speculatively developed building where tenants are sought in the marketplace, and encourages and facilitates the implementation of Green design and construction practices in areas over which the developer has control.[105] While LEED CS is relatively new, building owners report significant operating cost savings in suburban office buildings.[106]

LEED for Retail recognizes the unique nature of retail design and construction projects and addresses the specific needs of retail spaces.[107] LEED for Healthcare promotes sustainable design and construction for high performance healthcare facilities.[108]

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104. *Id.*

105. *Id.*

106. *See, e.g.*, Case Study of Seattle Biomedical Research Institute, http://www.buildgreennw.com/resources/CaseStudy_307Westlake.pdf (last visited Feb. 5, 2009). Corporate Office Properties Trust (COPT) is a specialty real estate investment trust that has three buildings certified Gold, three buildings certified Silver and twenty-six others registered for LEED certification. COPT Company Profile, http://www.copt.com/compro.html (last visited Jan. 23, 2009). The company reported for LEED CS Silver office buildings a nineteen cent per square foot reduced operating cost and on LEED CS Gold projects a seventy-two cent per square foot reduced operating cost. Sean Moore, Development Project Manager, COPT, Presentation at Maryland Economic Development Association Spring Conference: Why COPT Builds Green (Apr. 17, 2008), *available at* http://www.medamd.com/media/pdf/meetings/2008_springconf/Sean_MEDA_whycoptbuildsgreen_lr.pdf; *see infra* text accompanying notes 150–53.

107. U.S. Green Building Council, LEED for Retail – In Pilot, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1734 (last visited Jan. 24, 2009).

108. U.S. Green Building Council, LEED for Healthcare, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1765 (last visited Jan. 24, 2009) (discussing other LEED rating systems that are not likely to be for buildings subject to Green Leases). As a matter of background, there is a LEED for Schools rating system that recognizes the unique nature of the design and construction of K-12 schools and addresses the specific needs of school spaces. U.S. Green Building Council, LEED for Schools, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1586 (last visited Jan. 24, 2009). LEED for Homes promotes the design and construction of high performance Green single family and multi-unit houses. U.S. Green Building Council, LEED for Homes, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=147 (last visited Jan. 24, 2009). LEED for Neighborhood Development (currently still a pilot program) integrates the principles of smart growth, urbanism and Green building into a program for subdivision and neighborhood design. U.S. Green Building Council, LEED for Neighborhood Development, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=148 (last visited Jan. 24, 2009).

2. LEED 2009

The U.S. Green Building Council announced on November 18, 2008, that, in a balloting among its members, LEED 2009 was approved.[109]

In an effort to address the almost overwhelming success of LEED and to evolve technically, the approval of LEED 2009 was the culmination of a multiyear collaborative process balancing the dynamic tension between pursuit of environmental excellence and the business realities of the building industry.[110] When a second public comment period on LEED 2009 closed on September 2, 2008, almost 7000 comments had been offered.[111]

The approved LEED 2009 is not a wholesale overhaul, but rather a refinement and credit realignment of the existing LEED program.[112] The number of available points has risen from 69 under LEED v2.2 to 110 (actually a 100-point scale plus 10 bonus points) under LEED 2009.[113] More points are now needed to reach each level of certification. Reaching LEED Certified will now be 40 points or more (versus 26 points under v2.2); Silver is 50 points (versus the prior 33 points); Gold is 60 (versus 39 points); and Platinum is 80 points (versus 52 points).[114]

The overarching goal for the point realignment of LEED 2009 is to ensure that future buildings certified under its criteria are even greener than those approved to date.[115] In LEED 2009, the highest weightings are given to building practices that improve energy efficiency and reduce CO_2 emissions, to align with the USGBC's goal of climate change mitigation.[116]

LEED 2009 will be launched in February 2009, with a nationwide roll-out of workshops and the release of the new written reference guides.[117] The first registration of LEED 2009 projects will be

109. Letter from Rick Fredizzi, USGBC CEO & President, to USGBC Constituents (Nov. 18, 2008), *available at* http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1895.

110. *See id.*

111. An article detailing the LEED 2009 changes can be found on this author's law firm website. Stuart Kaplow, *LEED 2009 Is Approved on the Cusp of a Green Building Revolution* (2008), http://www.stuartkaplow.com/library3.cfm?article_id=153 (last visited Jan. 24, 2009).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *See* U.S. Green Building Council, LEED 2009 Timeline, https://www.usgbc.org/ShowFile.aspx?DocumentID=5176 (last visited Jan. 24, 2009).

accepted in May 2009.[118] LEED Online v3 will also go live during May and submittals may be made utilizing that new streamlined process.[119] Roll-out of LEED 2009 is scheduled to be complete in September 2009.[120]

VIII. PERCEIVED BARRIERS TO LEASING GREEN BUILDINGS

Acknowledging that Green building is a field in its infancy, as of January 2007, only 12% of LEED-rated buildings across the country were "for lease" buildings.[121] The market opportunity presented by that statistic is borne out by similar numbers in California, the state with the largest market penetration of Green buildings.[122] Of the 900 million square feet of office space in California, only 54 million square feet was leased and Green as of the 2nd quarter 2007, while 756 million square feet was leased and not Green.[123]

Many of those unknowing in the ways of Green have been heard to complain that a barrier to leasing a Green building is the split incentives resulting from a typical triple net lease where the owner would pay for the capital improvements, including Greening efforts to reduce energy use, but the tenant who pays the utility bills reaps the benefits of energy savings.[124] This matter is not easily ignored when tenants in 58% of U.S. office buildings occupy the premises using a "gross" lease,[125] where energy costs are included in their base rent and, as such, there is no financial incentive for a tenant to conserve. And, of course, most existing commercial leases do not allow for an easy reconciliation between, for example, a "first class office building" maintenance standard and "LEED EB: O&M Silver or equivalent" emerging Green building standard.[126]

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118. *Id.*
119. *Id.*
120. *Id.*
121. Scott Muldavin & Andrew Fusscas, *Financing Green Development*, URB. LAND GREEN, Spring 2007, at 80, 80.
122. *See* California Sustainability Alliance: The Market, http://www.sustainca.org/content/market (last visited Jan. 24, 2009).
123. *Id.*
124. Alan Whitson, *Green Lease*, ENVTL. DESIGN & CONSTRUCTION, July 17, 2006, *available at* http://www.edcmag.com/CDA/Articles/Column/cc0c0b5ca1e7c010VgnVCM100000f932a8c0.
125. *Id.*
126. S. Michael Brooks, *Green Leases and Green Buildings*, PROB. & PROP. MAG., Nov./Dec. 2008, at 23, *available at* http://www.abanet.org/rppt/publications/magazine/2008/nd/p+p_NovDec08_Brooks.pdf. The first class office building

These purported barriers to leasing Green buildings, while accentuating that a Green lease is not a monolithic concept, may be overcome with an appropriate Green lease. It is these types of economic issues that serve to make the argument that a Green building needs a Green lease; and that, obviously, no single form of boilerplate Green lease will serve all buildings.

IX. THE LEASE

A Green lease, at concept, addresses what happens after a Green building is delivered by the builder.

As with all commercial negotiations, the state of the marketplace and relative strength of the parties are of great import. In many instances today, those Fortune 500 companies that have adopted corporate Green practices programs, and along with the federal government, many state and local governments are leading the way and demanding Green premises within buildings.[127] In addition to reducing energy consumption and environmental stewardship, companies are now further motivated to go Green because of the marketing and public relations opportunities Green practices provide, as well as improved employee recruitment, retention, and increased worker productivity.[128]

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standard is subjective, S. Michael Brooks, *Green Leases Outline Responsibilities of Both Building Owners and Tenants*, REAL EST. F., July 2008, at 32, *available at* http://www.reforum-digital.com/reforum/200807/?pg=34, whereas LEED for Existing Buildings is an objective criterion that allows building management to measure operations, improvements, and maintenance to maximize efficiency and minimize environmental impacts. U.S. Green Building Council, LEED for Existing Buildings, http://www.usgbc.org/displaypage.aspx?CMsPageID=221 (last visited Feb. 4, 2009).

127. *See* BLDG. DESIGN + CONSTR., GREEN BUILDINGS AND THE BOTTOM LINE 20, 50 (2006), *available at* http://www.bdcnetwork.com. Such Fortune 500 companies include Citigroup, Wells Fargo, Bank of America, and Wachovia. *Id.* at 10.

128. *Id.* For example, a 2007 study demonstrated significant employee productivity improvement in a Melbourne law firm that moved to a refurbished Green office building. *See* SUSTAINABILITY VICTORIA & THE KADOR GROUP, EMPLOYEE PRODUCTIVITY IN A SUSTAINABLE BUILDING (2007), *available at* http://www.resourcesmart.vic.gov.au/documents/500_Collins_Productivity_Study.pdf . The move from its old office in the same building to a Green tenant space on a refurbished floor, provided "[a] 39% reduction in average sick leave days per employee per month: from 0.46 days before the move to 0.28 after the move;" "[a] 44% reduction in the monthly average cost of sick leave;" "[a] 9% improvement in the average typing speed of secretaries, with a significant improvement in overall accuracy;" and, "[a] 7% increase in lawyers' billing ratio [the proportion of billings to billings plus non-billable time], despite a 12% decline in the average monthly hours worked by the lawyers." *Id.* at 4. Accepting the small sample size, from a single law firm, the changes are significant when subjected to a statistical test. *Id.* Moreover,

While most commercial leases are strong "landlord weighted" documents (and such will undoubtedly remain the instance with Green leases), corporate tenants with a corporate initiative or unique Green brand may push a landlord to join in its existing Green program or dictate certain terms.[129] Similarly, the federal government has "certain threshold criteria" for Green leases, which, as described above, will become a significant market force because, with few exceptions, the federal government when leasing tenant spaces of 10,000 square feet or more is mandated to achieve, at a minimum, an Energy Star designation of 75 (on a 100-point scale).[130]

There are currently two widely accepted Green lease forms in use in the marketplace. While both are very new, each having only been made available in mid-2008, they have developed de facto standards for owners to incorporate into their existing leases.

First, the Real Property Association of Canada, *National Standard Green Office Lease for Single Building Projects 1.01-2008*, is an update of the non-Green version that is widely used in Canada.[131] Many of its Green concepts were adapted from an Australian form of Green lease (a jurisdiction where the application of the Kyoto Protocol has resulted in Carbon Offset Credits becoming a component part of commercial leases).[132] The "net" lease contains an

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very similar benefits were observed at Lonsec, a securities firm that moved into a refurbished Green office in the same building. *Id.* at 5.

129. By way of example, PNC Financial Services Group, the Pittsburgh-based banking company with twelve LEED certified branches among its 55 "eco-friendly" buildings, see GreenerBuildings, *A Dozen PNC Bank Branches Earn LEED Certification*, Oct. 14, 2008, http://www.greenerbuildings.com/news/2008/10/14/pnc-branches-earn-leed, advertises on major television networks and in print media that it has the most certified green buildings on earth. Press Release, PNC, Small Business Owners on Environment: First Priority Is Saving Money, Not Mother Earth (Oct. 30, 2008), *available at* http://pnc.mediaroom.com/index.php?s=43&item=593. Many of its Green bank branches are leased, costing $100,000 less to build than a standard PNC bank branch and using 40% to 50% less energy. Charles Lockwood, *As Green as the Grass Outside*, BARRON'S, Dec. 25, 2006, *available at* http://www.charleslockwood.com/pdf/barron's_article.pdf. Each branch was ready to go in forty-five fewer days. *Id.*

130. Memorandum from Samuel J. Morris, III, Acting Assistant Comm'r for Office of Real Estate Acquisition—PQC to the Assistant Reg'l Adm'rs, PBS Reg'l Realty Servs. Officers, at 2 (Dec. 27, 2007), *available at* http://fimsinfo.doe.gov/RE/green_lease_memo.pdf; *see also* Press Release, U.S. Dep't of Energy, DOE Headquarters Receives Energy Star Recognition from EPA (July 9, 2008), *available at* http://www.energy.gov/print/6402.htm.

131. The REALpac Green Office lease is available at http://www.realpac.ca/s_223.asp.

132. With the stated purpose of "improv[ing] energy efficiency, and consequently reduc[ing] the whole of life cost and environmental impact of [g]overnment

Environmental Management Plan and its various lease provisions are modified to require that tenants achieve certain specified targets.[133] For example, water consumption levels are monitored to ensure they do not average greater than *x* liters per square meter.[134] As a nice feature for practitioners, the lease is a "fair use" document available as a shared writing, free of charge.[135]

Second, *BOMA's Guide to Writing a Commercial Lease, Including Green Lease Language*, is a Greening of BOMA's widely used standard "net" lease document.[136] The document is a very good effort at integrating Green concepts into the body of an office lease (as opposed to the format of the REALPac Green lease that is drafted to locate Green language in a schedule as an Environmental Management Plan). The extensive explanatory side notes make the writing user friendly and add clarity and guidance.[137]

X. THE EMERGING TYPICAL GREEN LEASING SCENARIO

In the coming year, an office lease by a Fortune 500 company tenant for an entire developer-owned commercial office building (the most common form of nonresidential lease), where the developer has made application for LEED CS certification, will likely be among the most common applications of a Green lease.[138]

Large corporations and institutions account for most tenants in nonresidential Green buildings.[139] LEED buildings leased to a single business account for 38% of tenancies with government tenants

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operations," the Australian Department of the Environment publishes Green lease schedules for gross and net leases that are an excellent source for Green standards. Energy Efficiency in Government Operations, http://www.environment.gov.au/settlements/government/eego/ (last visited Jan. 18, 2009).

133. *Id.* (follow "EMP Template – Net Leases" hyperlink).

134. *Id.*

135. *See id.*

136. STEVEN A. TEITELBAUM, GUIDE TO WRITING A COMMERCIAL REAL ESTATE LEASE, INCLUDING GREEN LEASE LANGUAGE (Lisa A. Prats & Karen W. Penafiel eds., 2008), http://shop.boma.org (follow "Leases" hyperlink; then follow "Lease Guide" hyperlink) (last visited Feb. 4, 2009). This guide comes with an accompanying CD-ROM and can be purchased at the nominal price of $69 from Building Owners and Managers Association (BOMA) at http://shop.boma.org (follow "Leases" hyperlink; then follow "Lease Guide" hyperlink) (last visited Feb. 4, 2009).

137. TEITELBAUM, *supra* note 136.

138. The LEED third-party certification program is by far the most widely utilized in this country and arguably the now nationally accepted benchmark. As such, in considering lease language for the purposes of this article, LEED will be utilized.

139. Andrew J. Nelson, Vice President, RREEF Research, Remarks at Greenbuild International Conference and Expo: Trends and Perceptions Driving Corporate Sustainability and Investment Real Estate (Nov. 20, 2008).

occupying 22% of LEED buildings, schools and colleges accounting for 17%, and nonprofits accounting for 6%.[140] Buildings with more than one tenant only account for 17% of LEED buildings.[141] One reason market penetration may be so low for buildings with more than one tenant is that application for LEED EB: O&M certification is difficult in a multi-tenant building unless the existing leases require all tenants to cooperate in the LEED application process.[142]

There is a related trend in ownership of Green buildings. According to a 2002 assessment, private developers that offer buildings for lease owned only 3% of LEED certified buildings; however, that number skyrocketed to 21% by mid 2007.[143] Corporate owner occupied buildings, which had represented 44% of LEED buildings in 2002, dropped to 31% in mid-2007.[144]

The typical lease will be for a LEED CS building, which as described above can be used for projects where the owner controls the design and construction of the entire core and shell base building, but has no control over the design and construction of the tenant fit out.

Note, LEED CS is intentionally neutral regarding requirements for tenant build out. A LEED CS rating can be attained without making any requirements of a tenant.[145] A tenant can choose to pursue or not pursue a LEED Commercial Interiors (LEED CI) rating with no impact on the building's LEED CS rating.[146]

However, if an owner chooses to make specific lease requirements part of its tenant lease negotiation, and those requirements meet the criteria of a particular credit in the LEED CS rating, the shell

140. *Id.*

141. *Id.*

142. *See* U.S. Green Building Council, LEED for Existing Buildings, http://www.usgbc.org/DisplayPage.aspx?CMSPageID=221#v2008 (last visited Feb. 4, 2009). According to a 2008 survey, 47.8% of respondents indicated they do not have a Green lease in place in their existing buildings. *The 2008 Green Survey: Existing Buildings*, REAL EST. F., Nov. 2008, at 20, *available at* http://www.reforum-digital.com/reforum/200811/ [hereinafter *2008 Green Survey*].

143. ANDREW J. NELSON, THE GREENING OF U.S. INVESTMENT REAL ESTATE – MARKET FUNDAMENTALS, PROSPECTS AND OPPORTUNITIES, at 40 (2007), *available at* http://www.usgbcncr.org/Documents/RREEFResearch-TheGreeningofUSInvestmentRE-MarketFundamentalsProspectsandOpportunities.pdf.

144. *Id.*

145. *See* U.S. GREEN BUILDING COUNCIL, LEED GREEN BUILDING RATING SYSTEM FOR CORE & SHELL DEVELOPMENT (2006), http://www.usgbc.org/showfile.aspx?documentID=1728 [hereinafter LEED RATING SYSTEM FOR CORE & SHELL].

146. *See id.*

building owner may be able to receive a point for this credit even if the actual work is not part of the owner's core and shell construction (but rather, will be implemented as part of the tenant-controlled build out).[147]

Of course, leasing agents for commercial building owners have historically desired few, if any, lease requirements imposed on tenants as they seek to attract new tenants in the competitive marketplace. Now that Green is the new Black, tenants are increasingly willing, if not expecting, to negotiate for the benefits of being located within a Green building.[148]

XI. GREEN LEASE LANGUAGE

Green leasing language is new and untested, unlike traditional commercial lease forms, which contain text that dates to the English common law and that has been interpreted by American courts for hundreds of years. While the standardization of language has begun, Green leasing law is in its infancy and thus presents a tremendous opportunity for innovative thinking. A line-by-line recitation of Green lease language is beyond the scope of this Article (see either of the two lease documents described above), but a compilation and discussion of key Green elements of a commercial office lease follow. Given that the majority of leases are landlord-weighted documents, the discussion that follows is from the perspective of a landlord.

Term. The length of a lease term is now a Green issue suggesting longer leases in an effort to conserve resources, reduce waste, and reduce the environmental impacts of changes in tenants as they relate to materials, manufacturing, and transport. A tenant that commits to remain in the same leased premises "for not less than 10 years" is a 1 point credit toward LEED CI certification (where a 5-year term with a 5-year renewal option will not capture the credit).[149]

Operating costs. Based upon actual cost tracked by CoStar, the commercial real estate information company, an office building landlord should save, at a minimum, between $1.00 and $1.30 per square foot on operating expenses with a LEED NC Silver building, with approximately one-third of the savings coming from energy

147. *Id.*

148. A form of prospective tenant's Request for Proposal to lease Green office space, prepared by the California Sustainability Alliance, is available at http://sustainca.org/files/ Green%20RFP.pdf.

149. U.S. GREEN BUILDING COUNCIL, LEED FOR COMMERCIAL INTERIORS, at MR Credit 1.1: Tenant Space, at 34 (2005).

costs.[150] Landlords are likely to realize a portion of that savings in increased rent, maybe up to half in more cynical markets, and even more in those markets where the federal government and tenants committed to sustainability are present.[151]

Assuming a form of lease where the tenant pays its proportionate share of operating costs to the landlord, in a Green lease a landlord will want to make certain that the costs of commissioning and enhanced commissioning of building systems designed to be Green and the costs of seeking and making application for certification under LEED or the like, as well as other outlays that reduce operating costs, are all characterized as operating costs chargeable in a single year (i.e., and not capitalized). Other operating costs will of course vary between Green buildings, but costs will be lower for energy (which should be a significant ongoing cost savings for a landlord, even when tenant premises are separately metered), which will increase the value of an income-producing Green building.[152] The below cost discussions of Insurance and Property Taxes are also relevant.[153]

Permitted use. A Landlord will want to modify its standard use provision, even in a general office lease, to add a covenant similar to: ". . . and only use the premises in a manner consistent with and that does not violate the certification of the building by the U.S. Green Building Council LEED rating system." A landlord may also desire to require any use to be consistent with the "landlord's sustainability policies" or the "landlord's Environmental Management Plan"[154] to the extent that such exists or is included in the lease.[155]

Insurance. The property insurance marketplace was the first to offer special coverages for Green buildings. At least five insurers

150. Jay Spivey, Dir. of Analytics, CoStar, Remarks at Greenbuild International Conference and Expo: Does Green Pay Off? (Nov. 20, 2008).

151. *Id.*

152. The rule of thumb is "[b]uildings increase in value eight to ten times the operational savings." OLSEN, CARNEY & ARNY, *supra* note 69, at 6.

153. *See infra* text accompanying notes 156–58.

154. An example of an Environmental Management Plan is found in the REALpac Green Lease. NATIONAL STANDARD GREEN OFFICE LEASE FOR SINGLE BUILDING PROJECTS 1.01-2008, at 35 (2008), *available at* http://www.realpac.ca/s_223.asp. A landlord may already have included an Environmental Management Plan for the building as a component part of the LEED Core & Shell certification submittal, in which case the additional inclusion of this plan in the lease would not require any additional drafting.

155. *2008 Green Survey*, *supra* note 142. Among the significant findings of the survey, 55% of respondents indicated that, as part of the lease, they provide their tenants with an operations manual that includes good environmental management practices. *Id.*

have issued Green enhancements to their standard property forms or specific Green insurance policies.[156] Several of these insurers offer significant discounted pricing for building owners and tenants who commit to Green standards.[157] The rationale is that with "state of the art" electrical, plumbing, and roof systems, Green buildings experience fewer incidents of risk and loss.

Also there are other insurance issues. Green certified building coverage is being written broadly enough to include coverage for a vegetated roof, alternative water system, and Green power generating equipment. It can include the cost of hiring a LEED accredited professional to oversee the repairs. Some policies cover the cost of a commissioning agent to ensure that building systems (HVAC, electric, and plumbing) operate at peak performance and in alignment with one another.

Interestingly, some carriers now offer a "Green upgrade coverage" that lets an owner replace standard systems and materials with Green ones in the event of a loss.[158] These cover the cost to rebuild and replace with specified green alternatives such as: low volatile organic compound (VOC) paints and carpeting, Energy Star rated electrical equipment, roof and insulation materials, energy-efficient lighting systems, and water-efficient interior plumbing.

Property taxes. Increasingly, local governments offer property tax reductions for Green buildings and a Green lease must prescribe who captures that benefit. In most instances, the landlord, who has made the capital improvement, will demand the tax credit and the tenant will arguably also benefit because the building has lower operating costs built into the base year. There will be no tax increases in some number of out years while the tax credit continues.

Tenant improvements and alterations. No issue may be as significant as the nature of the "to be constructed" tenant build out of the leased premises. As noted above, a LEED CS rating can be attained without making any requirements of a tenant. However, a tenant having a Green interior premises may be the basis of the bargain in many instances. One fairly simple method of

156. These companies are Fireman's Fund, American International Group (AIG), ACE Group, Travelers, and Liberty Mutual.

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158. *See, e.g.*, Fireman's Fund: Green Building Solutions, http://www.firemansfund.com/servlet/dcms?c=business&rkey=437 (last visited Feb. 4, 2009); Press Release, Travelers, Travelers Designs Innovative Green Building Insurance for Small Businesses (Oct. 28, 2008), *available at* http://investor.travelers.com/phoenix.zhtml?c=177842&p=irol-newsArticle&ID=1218391&highlight=.

accomplishing this aim is simply to add lease language that provides, "tenant agrees to seek and maintain LEED CI certification for the tenant improvements and all alterations." Beyond that baseline, a landlord may require specific LEED CI credits that impact areas beyond the leased premises, including, for example, an Indoor Air Quality Management Plan during construction implemented by the tenant's construction company. Of course, as another alternative, the build out could be required to be only at a LEED CI "certifiable" standard in lieu of mandating an application to USGBC.

Recognizing that the LEED standard is potentially burdensome for certain tenants, landlords may wish to prepare their own sustainability policies or an Environmental Management Plan for the building (possibly as a component part of the LEED CS submittal); attaching that document to the lease (often as a separate schedule); and requiring a tenant's architects to certify that the build out will comply with those required policies described in that lease schedule.

As an alternative to LEED CI certification (or in addition to LEED CI when a landlord wants to mandate higher threshold requirements), a Green building landlord could append a schedule of contractor rules as a component of a tenant work letter. These contractor rules would mandate Green practices, from erosion and sediment control to indoor air quality during construction, to the use of low VOC carpeting and adhesives. The landlord may also require carpet cushioning to meet the requirements of the Carpet and Rug Institute Green Label or Green Label Plus program and be 100% recyclable; all paint to be low VOC; ceiling tiles to be 70% recycled content or greater; and required recycling of construction waste.

A sustainable purchasing program can extend well beyond construction materials for a tenant build out. Sustainable purchasing policies can include furniture and furnishings with recycled content, as well as products manufactured regionally, Energy Star rated equipment, reduced mercury lamps, and more, all of which can contribute to LEED credits.[159]

Tenants with strong bargaining positions desiring the benefits of Green building may consider requiring the landlord to maintain the building common areas and other tenant premises in accordance with

159. U.S. GREEN BUILDING COUNCIL, LEED FOR COMMERCIAL INTERIORS, MR Credit 5.1: Regional Materials, at 44 (2005), *available at* http://www.usgbc.org/ShowFile.aspx?DocumentID=684; U.S. GREEN BUILDING COUNCIL, LEED FOR EXISTING BUILDINGS: OPERATIONS & MAINTENANCE, MR Prerequisite 1: Sustainable Purchasing Policy 45 (2008), *available at* http://www.usgbc.org/ShowFile.aspx?DocumentID=3617 [hereinafter LEED EB: O&M].

the same standards identified in an Environmental Management Plan lease addendum, including where the landlord is responsible for the HVAC, and monitoring indoor air quality for increased ventilation, contaminant concentrations, including formaldehyde, total VOCs, carbon monoxide, and similar metrics.[160]

Maintenance and repair by tenant. Much as with the issue of tenant initial build out and alterations (discussed above), a method of accomplishing the aim of Green tenant premises is to add lease language that provides: "tenant agrees to seek and maintain LEED CI certification for all tenant improvements and alterations, maintenance and repair." Additionally, depending upon the third-party certification sought for the building, it may be necessary for the landlord to require the tenant to report certain matters, for example, "lamp bulb and tube" purchases, to the landlord.[161]

Removal of tenant improvements and fixtures. Credits in the LEED checklists become a critical issue when a tenant under a Green lease undertakes the removal of tenant improvements and fixtures. In many instances, a tenant cannot simply dispose of the build out and furniture via a dumpster. A landlord could easily include language to the effect that "any removal by the tenant of any leasehold improvements, trade fixtures or personal property from the premises shall be accomplished by or on behalf of the tenant in an environmentally sustainable manner, including reuse and recycling, all of which must be reported to the landlord in the format requested by the landlord." However, this language is likely overly burdensome and more than would be required for compliance with applicable LEED credits for solid waste management.

Parking. Historically, tenants have negotiated for greater numbers of off-street parking spaces, often in excess of local zoning requirements. This thinking controverts principles of sustainable development, of reducing pollution, and of combating the land development impacts from single occupancy car use. LEED CS offers a credit for parking capacity that is sized to not exceed

160. Not all tenant improvements are created alike. As noted above, Brennan Beer Gorman Architects' new space on the 25th floor of the Empire State Building, for which the tenant will seek LEED CI, required installing two 9500 pound chillers on the building's southwest setback roof. This involved using the largest crane available on wheels in Manhattan on a Saturday—something never before attempted at the 102-story high-rise. Del Percio, *supra* note 101. This build out suggests some of the intricacies of Green construction contracts and Green lease provisions, including whether the landlord or tenant should be responsible for the installation of such equipment and how associated savings might be shared between the parties.

161. *See* LEED EB: O&M, *supra* note 159, MR Credit 4: Sustainable Purchasing, at 52–53.

minimum local zoning requirements and that requires the building occupants to participate in programs (including surveying of tenant employees) that facilitate ride-sharing and the use of public transportation.[162]

Access by landlord. Many commercial leases limit a landlord's access to the premises in nonemergency situations. A Green lease should, at a minimum, expand the right of access for ". . . other efforts that may be necessary or proper to implement the landlord's sustainability practices and otherwise maintain any third-party Green certification."

Solid waste management. While the obligation for most Green issues can be clearly segregated between the landlord and tenant, responsibility for the storage and collection of recyclables are intertwined. A common goal across various LEED rating systems is to reduce the solid waste generated by building occupants that is disposed of in a landfill.[163] This is a prerequisite for a tenant's LEED CI certification, but providing an easily accessible dedicated area for recycling, along with a plan for recycling, qualifies a landlord for a LEED point in LEED CS and is a mandatory landlord obligation in LEED EB.[164] The obligation to participate in a waste stream audit is all but standard in new Green leases. Additionally, the tenant should be obligated to comply with the building Solid Waste Management Plan,[165] which may over time be expanded for a zero waste building.

Signs. Issues of exterior building signage take on a Green hue when lit beyond dusk and beyond the matters of size, location, and aesthetics. "Light pollution reduction" and energy efficiency thresholds that may reduce the hours signage is illuminated, are matters that may be the subject of LEED credits and as such will need to be the subject of lease negotiations.

Utilities. As is clear by the fact that commercial buildings utilize almost half of all electricity consumed in the United States,[166] the current standard office lease does not encourage conservation. Depending upon how utilities are provided, there may be a host of

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162. LEED RATING SYSTEM FOR CORE & SHELL, *supra* note 145, SS Credit 4.4: Alternative Transportation, at 18.

163. *See, e.g.*, U.S. GREEN BUILDING COUNCIL, LEED FOR EXISTING BUILDINGS: OPERATIONS AND MAINTENANCE, at MR Prerequisite 2: Solid Waste Management Policy, at 46 (2008), *available at* https://www.usgbc.org/ShowFile.aspx?DocumentID=3617.

164. *See id.*

165. *See id.*

166. BUILDINGS AND THE ENVIRONMENT, *supra* note 4.

issues, such as whether tenant premises are separately metered (which may be ideal in encouraging conservation). The landlord will almost certainly need to control electricity suppliers. Many leases currently provide that a tenant may only purchase electricity from a supplier on a landlord approved list. Now landlords will need to reserve the right "to change approved electricity suppliers for reason of efficiency, costs, or to purchase green or renewable electricity; or to provide on-site renewable energy for the benefit of the tenant." A contract for Green power may generate a LEED point that can benefit both the tenant and the landlord.[167] A key negotiating point is now that Green buildings may severely limit after hours and weekend HVAC, requiring a tenant to pay the actual costs in an effort to meet building energy reduction thresholds. The landlord should be entitled to carbon offset credits resulting from investments made by the landlord. Additionally, utility provisions should require a tenant to provide the landlord with copies of utility bills and to participate in a landlord's Energy Star Portfolio Manager survey,[168] so that the landlord can accumulate the data reasonably required to submit a LEED certification application.

Assignment and subletting. Matters of Green also require that the usually highly negotiated provisions of the tenant's assignment or subletting of the lease, be modified. The law generally imposes an obligation of good faith in evaluating a tenant's request to assign or sublet and as a result many landlords enumerate criteria for evaluating such a request. Added to that criteria should now be: "it will be a proper basis for the landlord to not consent . . . if the proposed assignee may cause the premises or the building not to conform with any of the environmental and Green building provisions of this lease."

Housekeeping and maintenance. Housekeeping and maintenance services take on an important Green component, whether provided by the landlord or prescribing practices of the tenant. A Green lease may provide that office cleaning will be done during normal business hours, or immediately thereafter, to reduce energy use required for off hours routine cleaning. Also, the lease (possibly in the lease rules and regulations) will provide for housekeeping practices that only permit the use of "sustainable cleaning chemicals that meet the Green

167. LEED RATING SYSTEM FOR CORE & SHELL, *supra* note 145, EA Credit 6: Green Power, at 48.

168. Portfolio Manager is an interactive tool that allows a building owner to track and assess energy and water consumption of a building in a secure online environment. *See* Energy Star, Portfolio Manager Overview, http://www.energystar.gov/index.cfm?c=evaluate_performance.bus_portfoliomanager (last visited Feb. 4, 2009).

Seal GS-37 standard,"[169] other cleaning supplies and equipment that reduce the impact in indoor air quality, and the like. If a third-party cleaning contractor is employed by the tenant, the lease should provide for the contractor to produce a copy of its Green cleaning policies and sustainable purchasing practices, including being able to provide documentation required for LEED certification.

Relocation of the tenant. Many leases provide that "the landlord shall have the right to relocate the premises to other premises within the building." While the tenant traditionally was concerned with whether the new premises was of the same or similar quality, a tenant in a Green lease will want lease language to provide that "the new premises will meet or exceed the Green certification rating of the existing premises."

This compilation of Green lease text is intended only to be suggestive of the issues arising in a Green commercial lease. As attorneys counsel and advise clients in the quickly evolving field, actual lease language will be driven by the innovations of landlords and tenants and only limited by the creativity of those drafting the lease.

XII. ALL LEASES AND RENEWALS—THE TIME IS NOW

Given that leases for commercial buildings are long-lived agreements, both landlords and tenants should consider incorporating language in all new leases and renewals (even for existing buildings that are not Green, but that might in the future seek LEED EB: O&M certification) to include verbiage such as that suggested above. Leases should also include a statement that "the tenant will cooperate, join in, and pay its proportionate share of costs for developing a plan for, and modifying and operating the building to achieve LEED EB: O&M, or equivalent, certification." As noted above, without this concept incorporated into each lease for a building with more than one tenant, the owner of an existing building may not easily (or at least not at a reasonable cost) make application for LEED EB: O&M certification.

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169. On September 4, 2008, Green Seal released the revision of GS-37, its environmental standard for institutional and industrial cleaning products reflecting advances in cleaning technology, toxicology, health science, and awareness of health concerns (e.g., air emissions, endocrine disruptors, and asthmagens). Press release, Green Seal, Final Version of GS-37 Released (Sept. 4, 2008), *available at* http://www.greenseal.org/newsroom/GS_37_revision_release.pdf. GS-37 does *not* include cleaners for household use, food preparation operations, or medical facilities. *Id.*

As a practical matter, existing buildings must be Greened without amending existing leases. In this time of economic uncertainty, building owners with current vacancies and leases soon to expire will be more timely advantaged by being able to include Green lease provisions in new leases. While ground leases are in many instances more a financing vehicle than a traditional leasehold conveyance, owners are increasingly requiring that all improvements to the land meet a Green building standard or Green threshold established by the locality to be eligible for the maximum available tax credits or the like. Landowners argue that such a lease provision is key to maximizing asset value.

XIII. CONCLUSION

Green building has evolved from a niche market to a major market segment in the $1.2 trillion annual U.S. construction market.[170] The last year has been marked by economic uncertainty yet we are still on the cusp of the Green building and sustainable real estate development revolution. In 2008, Green building only made up 10% of domestic construction output.[171] However, the economic benefits of Green building buttressed with government incentives and mandates, including significantly the hundreds of billions of dollars of new federal spending and tax credits for the new Green economy proposed in then-President-elect Obama's American Recovery and Reinvestment Plan, will markedly increase that percentage in short measure.[172]

With the business terms that allocate risks and rewards still being determined in this fast evolving field of leasing Green buildings, there are great opportunities for all involved to maximize the Sustainability Dividend while minimizing adverse environmental impacts from buildings and their operation. The market shift to Green building is gathering force. Green building will soon be the rule rather than the exception. In an effort to comply with federal, state, and local government mandates and to capture the Sustainability Dividend in this major market segment, the time is now to modify all commercial lease forms, including most importantly leases for premises with the possibility of future LEED EB: O&M certification.

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170. McGRAW-HILL CONSTR., *supra* note 8, at 10.

171. *Id.*

172. Barack Obama, then-President-elect, Speech on the Economy (Jan. 8, 2009) *available at* http://www.nytimes.com/2009/01/08/us/politics/08text-obama.html?_r=1&scp=5&sq=green%20American%20Recovery%20and%20Reinvestment%20Plan&st=cse.

Drafting a Green lease is an art in its infancy. This Article is by no means a comprehensive treatment of the subject. This author's goal is modestly to assist you in participating in the Green building revolution and securing the resultant Sustainability Dividend for your clients.

And yes, a Green building does need a Green lease. It's time to act.